Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-508

NO._____

SUPREME COURT OF THE

UNITED STATES

MAXINE L. MASTROPIETRO, PETITIONER

V.

ROBERT ALAN MASTROPIETRO, RESPONDENT

ON WRIT OF CERTIORARI TO THE

SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

October Term, 1986

MAXINE L. MASTROPIETRO,
Petitioner,
v.
ROBERT A. MASTROPIETRO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioner, Maxine L. Mastropietro, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on April 30, 1986. A petition for certification to the Supreme Court of New Jersey was denied, without opinion, on June 27, 1986.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of Due Process and Equal Protection of the law under the 14th Ammendment to the U.S. Constitution, by the decision of the trial court, affirmed by the Superior Court of New Jersey, Appellate Division, to amend a 5 year old divorce judgment, without affording petitioner the procedural safeguards, and without applying proper standards, required by state law.

2. Whether petitioner was deprived of parenting rights in violation of the 1st, 9th and 14th Ammendments to the U.S. Constitution, by the decision of the state courts to summarily amend a 5 year old divorce judgment which set forth a parental choice as to where the children of the parties should live, in the absence of any evidence that that parental choice was harmful to the

welfare of the children.

3. Whether petitioner was deprived of Due Process and Equal Protection by being ordered to relinquish valuable property rights without benefit of an evidentiary hearing, required by New Jersey state law.

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JURISDICTION

The decision of the trial court was affirmed by the Superior Court of NJ, Appellate Division on April 30, 1986 (a102). A petition for certification was denied by the Supreme Court of New Jersey on June 27, 1986 (a106). This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

1. United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. United States Constitution, Amendment 9:

> The enumeratioon in the Constitution

of certain rights, shall not be construed to deny or disparage others retained by the people.

3. United States Constitution, Amendment 14: section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Rules Governing the Courts of the State of New Jersey, 1986, Rule 4:50-1,2:

RULE 4:50. RELIEF FROM JUDGMENT OR ORDER

4:50-1. Grounds of Motion

On motion, with briefs, and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (a)mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R.4:49;(c)fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is not longer equitable that the judgment or order

should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

4:50-2. Time of Motion

The motion shall be made within a reasonable time, and for reasons (a), (b) and (c) of R.4:50-1 not more than one year after the judgment, order or proceeding was entered or taken.

5. Rules Governing the Courts of the State of New Jersey, 1986, Rule 4:42-1 Form; Settlement:

(a)Form; Settlement by Motion or Consent. A judgment shall not contain a recital of the pleadings or a record of prior proceedings. Except as otherwise provided by paragraph (b) of this rule, by other rule or by law, and except for ex parte matters, no judgment or order shall be signed by the court unless the form thereof has been settled on motion

on notice to all parties affected thereby who are not in default or failure to appear, or unless the written approval of such attorneys or parties to the form thereof is endorsed thereon. Formal written judgments or orders shall be presented to the court for execution within 10 days after its decision is made known, unless such time is enlarged for good cause.

(b) Settlement on Notice. In lieu of settlement by motion or consent, the party proposing the form of judgment or order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party not in default together with a notice advising him that unless he notifies the judge and the proponent of the judgment or order in writing of his specific objections thereto within 5 days after such service, the judgment or order may

be signed in the judges discretion, if no such objection is timely made, the judge may forthwith sign the judgment or order. If objection is made, the matter may be listed for hearing in the discretion of the court.

(c) Submission and Filing of Orders and Judgments. An original and two copies of all forms of orders and judgments shall be submitted to the judge together with a self-addressed, stamped envelope. The judge signing the order or judgment shall file the original and one copy thereof and return one copy to the attorney submitting the order or judgment. In matrimonial matters such additional copies of the orders shall be submitted as required by the court.

6. Rules Governing the Courts of the State of New Jersey, Rule 1:6-3: Time for Serving and Filing Motions, Cross-motions and Affidavits:

Except as otherwise provided by R.4:46-1(motion for summary judgment), a notice of motion, other than an ex parte motion, shall be served and filed not later than 14 days before the time specified for the return date unless otherwise provided by rule or court order. For cause shown, such an order may be made on ex parte application. If a motion is supported by affidavit, the affidavit shall be served and filed with the motion; and, except as provided by R.4:49-1(b)(motion for new trial), any opposing affidavits and corss-motions or objections filed pursuant to R.1:6-2 shall be served and filed not later than 8 days before the return date unless the court permits them to be served at a later time. Answers or responses to any opposing affidavits and cross-motions shall be served and filed not later than 4 days before the return date unless the

court otherwise orders.

5. N.J.S.A. 2A:62-1, 4, 17, 18: ACTIONS TO QUIET TITLE:

2A:62-1. By person in peaceable possession

Any person in the peaceable possession of lands in this state and claiming ownership thereof, may, when his title thereto, or any part thereof, is denied or disputed, or any other person claims or is claimed to own the same, or any part thereof or interest therein, or to hold a lien or encumbrance thereon, and when no action is pending to enforce or test the validity of such title, claim or encumbrance, maintain an action in the superior court to settle the title to such lands and clear up all doubts and disputes concerning the same.

2A:62-4. Jury trial; issues; place of trial

Upon the application of either party, a jury trial shall be directed to try the validity of a claim made to the affected lands, or to settle the facts, or any specified portion of the facts upon which the same depends. The trial may be held in and before a jury of a county other than that in which the lands involved are situate, whenever it is ordered by the order directing such trial or by any other order made by the court in the cause.

2A:62-17. Persons entitled to maintain action

When a person claims to be entitled to a vested estate in remainder in lands in this state or to remainder interest in personalty and his title thereto, or any part thereof, is denied or disputed, or another person claims or is claimed to own the same, or any part thereof or

interest therein, or to hold a lien or encumbrance thereon, and no action to which he is a party is pending to enforce or test the validity of any alleged title, interest, claim, lien, or encumbrance, the person claiming to be titled to the estate or in interest may maintain an action in the superior court to settle the title to the estate or interest and to clear up all doubts and disputes concerning the same.

2A:62-18.Jury trial; issues; adjudication by court

Upon the application of either party, a jury trial shall be directed to try the validity of the claims made to the estate or interest, or to settle the facts, or any specified portion of the facts upon which the same depends.

When such jury trial is not requested, or as to the facts for which the same is

not requested, the court shall proceed to inquire into and determine such claims, interest and estate, and shall, upon the verdict, or upon such inquiry and determination, finally settle and adjudge whether the defendant has any estate, interest or right in or encumbrance upon said estate in remainder in said lands or remainder interest in said personalty, or any part thereof, and what the same is and in or upon what part of said lands or personalty the same exists.

STATEMENT OF THE CASE

Petitioner, Maxine L. Mastropietro, and respondent, Robert A. Mastropietro, were married on August 4, 1973. On September 11, 1980 the parties were divorced by Dual Final Judgment of Divorce, Superior Court of New Jersey, Chancery Division, Somerset County, Docket No M-8660-79 (a1-a9)

Three children were born of the marriage: Brian Mastropietro, born February 17,1975, Michael Mastropietro, born May 24, 1976 and Jeffrey Mastropietro, born May 9, 1978.

The parties stipulated for the record a property settlement agreement which was incorporated in the Final Divorce Judgment. Paragraph 4 of the Final Judgment specifically addressed disposition of the marital residence. A court appointed appraisor was to

establish a fair market value for said property; for one half of said appraised value, plaintiff would transfer all of her interest in said property to the defendant; title would vest with the defendant on performance of an executory condition:

> "The condition of this conveyance, however, shall be the continued occupation of the said [residence] by the defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school, this condition being the basis on which this arrangement and custody have been made between plaintiff and defendant." (a5)

This executory property condition was expressly set forth on the deed to the property. (a13)

On June 19, 1985 respondent, represented by counsel, filed a motion with the Superior Court of New Jersey, Chancery Division, seeking to rescind

this executory property condition. Respondent also sought to restrict petitioner's extensive and unlimited visitation with the minor children of the parties. Respondent's motion was supported solely by his certification. No legal brief accompanied respondent's papers.

Petitioner, pro se, filed a certification in opposition to respondent's motion (a23-a30) and, on July 12, 1985, oral argument was held before the Honorable Michael R. Imbriani, JSC (a30-a40)

At the conclusion of oral argument, Judge Imbriani denied respondent's application to restrict visitation, but granted his motion to amend the divorce judgment with respect to the condition of his continued residence of the marital home. (a39)

On July 15, 1985 Judge Imbriani

signed an Order permitting respondent to move from the marital residence, but forbidding him from moving more than 3 miles from petitioner's home. (a40-a43)

On July 22, 1985 respondent filed a second motion seeking Reconsideration of the July 15th Order. On August 2, 1985 oral argument again took place before Judge Imbriani. In his oral opinion of that date Judge Imbriani modified his Order of July 15th, thus permitting respondent to move up to 4.1 miles from petitioner's home.

On August 9, 1985 another Order was signed by Judge Imbriani. (a55-a58)

On September 6, 1985, petitioner, pro se, filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division.

On September 25, 1985, present counsel was substituted for petitioner pro se.

On April 30, 1986, the Superior Court, Appellate Division, affirmed the decision of the trial court. The Court held that the trial court had discretion under Rule 4:50 to vacate the judgment, that it had not abused its discretion, and that the time requirements of Rule 4:50-2 had not been violated. Petitioner's Constitutional Arguments were ignored. (a94-a102)

On May 29, 1986 petitioner filed a petition for Certification with the New Jersey Supreme Court seeking to reverse the decision of the Appellate Division. On June 27, 1986, the Supreme Court denied the petition for Certification, declinig to consider the case. (a105) Because the New Jersey Supreme Court declined to consider the case, the instant petition for certiorari is brought to review the decision of the Superior Court of New Jersey, Appellate

Division. (Western_Union_Telegraph_Co_v Priester 276 US 252, 48 S Ct 234 (1928); Michigan-Wisconsin_Pipeline_Co_v_Calvert 347 US 157, 74 S Ct 396 (1954).

Each of the federal questions raised by petitioner was raised at an appropriate time in the State Court proceedings:

1 The first question raised by petitioner is whether the failure of both the trial court and the Appellate Division, to follow required procedures, and to apply proper standards under the existing New Jersey law, resulted in a denial of Due Process and Equal Protection under the 14th Amendment to the US Constitution.

The first such failure concerned the time standards under New Jersey law for service of motion papers. Rule 1:6-3 of the Rules Governing the Courts of the State of New Jersey, quoted above,

requires service of motion papers at least 14 days prior to the return date of the motion.

Petitioner was served with respondent's motion papers on July 22, 1985. The motion was returnable on August 2, 1985, eleven days later. Petitioner raised this point in her Certification in Opposition. (a44-a45)

The next rule which was violated was Rule 4:42-1 (quoted above) which requires that the party not submitting an order be afforded the opportunity to be heard by the judge concerning the form of the order, prior to its execution by the judge.

This rule was violated with respect to both Orders entered by the trial court, the Order of July 15, 1985 (a40-a43) and the Order of August 9, 1985 (a55-a58).

Again, petitioner, although pro se

at the time, immediately raised this point at the trial level.

With respect to the July 15, 1985 Order, the issue was raised in petitioner's Certification of July 26, 1985 at paragraph 11 (a48-a49). With respect to the August 9, 1985, Order, it was raised in Petitioner's Certification in Support of her Motion to Clarify the Form of the Order (a61-a62).

At the Appellate level this issue was raised at page 2 and again at page 4 of petitioner's brief in support of her appeal (a64-a66). It was again raised at page 7-10 of petitioner's Reply Brief on appeal (a91-a93).

The next failure to apply proper standards concerned the requirements for vacating judgments under Rule 4:50 quoted above. At no point in the proceedings did respondent set forth any extaordinary circumstance which would permit a 5 year

old judgment to be vacated, as required by clear New Jersey case law. (see infra for full discussion).

This point was raised by petitioner in her initial Certification in Opposition, dated July 5, 1985, at paragraph (4). (a25)

It was again raised at oral argument by petitioner on July 12, 1985 (July 12 Transcript at page 14, a36-a38)

At the Appellate level the argument was raised at page 6, 12, 14-17 of petitioner's brief on appeal (a68,a73,a75-a81). It was raised again as the first question presented at page 5 of petitioner's Petition for Certification to the New Jersey Supreme Court. (a103)

The next violation of State procedural rules was respondent's failure to meet the time requirements for the bringing of a motion to vacate a judgment

under Rule 4:50-2. This issue was raised in petitioner's Appellate Brief at page 18-20 (a83-a88), and again as Question (2) on page 5 of her Petition for Certification to the New Jersey Supreme Court (a103).

The final violation of State procedural rules was the failure of the trial court to provide petitioner with a fair opportunity to present her opposition to respondent's motion at a plenary hearing.

This point was raised in petitioner's Certification in Opposition to Motion to Modify Dual Final Judgment of Divorce at paragraph (13) (a29), petitioner's Appellate Brief at page 23 (a88), and again in her Petition for Certification to the New Jersey Supreme Court as question (3) on page 5 (a104).

II The second question raised by petitioner is whether she was deprived of

parenting rights guaranteed by the 1st, 9th and 14th Amendments to the US Constitution, by the State court's decision to summarily amend a 5 year consent judgment, setting forth a parental choice with respect to where the children should live.

The issue was first raised by petitioner in her July 5, 1985 Certification in Opposition to the original motion (a24-a25). It was again raised at oral argument of the Motion (July 12, 1985 Transcript at page 7, 10, 12, 15)(a30-a40)

It was raised again at the appellate level at page 9-10 of petitioner's Appellate Brief (a69-a73), and as question 5, at page 5 of her Petittion for Certification to the New Jersey Supreme Court (a104).

III The final question raised by petitioner is whether she was deprived of

Due Process and Equal Protection under the 14th amendment, by being ordered to relinquish valuable reversionary property rights without benefit of an evidentiary hearing: specifically guaranteed under New Jersey law.

This point was raised in petitioner's brief on appeal at page 20-23 (a87-a90) and again as question (4) on page 5 of her Petition for Certification to the New Jersey Supreme Court (a104).

REASONS FOR GRANTING THE WRIT

1. AT EVERY LEVEL OF THIS PROCEEDING, PROCEDURAL SAFEGUARDS AND SUBSTANTIVE STANDARDS REQUIRED BY NEW JERSEY LAW WERE VIOLATED. THE RESULT WAS THAT PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE 14TH AMENDMENT

Although states are generally left free to regulate the procedures of their judicial systems without fear of federal interference, where those procedures, either as formulated, or as carried out

in a specific case, violate a basic principle of justice, the United States Supreme Court has not hesitated to step in to remedy the injustice:

"The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' (Snyder v Massachusetts 291 US 97)...But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law." 1 Brown v Mississippi 297 US 278, 285

1. Though Snyder, Brown, Chambers and Rideau are all criminal cases, the Supreme Court has not hesitated to apply similar principles in the context of civil litigation (Marshall v Jerricho, Inc 446 US 238, 242 (1980); Carey v Piphus 435 US 262 (1978)

(1936)(cf Chambers_v_Forida 309 US 227 (1940): Rideau_v_Louisiana 373 US 723 (1963)).

In the instant case, petitioner does not question the power of the State of New Jersey to formulate substantive and procedural standards and guidelines for the administration of the judicial system within the state. Nor does she question the Constitutionality of those standards which are applicable to this case. What she does question is the constitutionality of the actions of the state courts in applying, or in failing to apply, those standards in this case.

From the outset of this case, clear guidelines of judicial procedure were violated by respondent with the acquiescence of the trial judge, and by the court itself:

(1) Rule 1:6-3 of the Rules Governing the Courts of the State of New

Jersey (set forth above) requires that motion papers be served on all parties at least 14 days prior to the return date. On July 22, 1985, petitioner was served with motion papers returnable 10 days later. As a result, petitioner was not afforded sufficient time to obtain counsel and was forced to represent herself at oral argument of the motion (Petitioner's Certification of July 26, 1985, paragraph 2,3,10: a44-a45,a48). It was certainly for the very purpose of avoiding such an injustice that the minimum time requirements of Rule 1:6-3 were promulgated by the New Jersey Supreme Court. Yet in this case these requirements were ignored.

(2) Rule 4:42-1, permits the form of an order to be settled in one of two ways: (a)"..Settlement by Motion or Consent...no...order shall be signed by the court unless the form thereof has

been settled on motion on notice to all parties affected thereby...or unless the written approval of such attorneys or parties to the form thereof is endorsed thereon..."; or (b) "Settlement on Notice. In lieu of settlement by motion or consent the party proposing the form of...order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party...together with notice advising him that unless he notifies the judge and the proponent of the judgment or order in writing of his specific objections thereto within 5 days after such service, the...order may be signed in the judge's discretion."

The purpose of this rule is to insure that an oral decision of a trial court is accurately reflected in the written order arising therefrom, and to insure that the party not submitting the order is

afforded an opportunity to be heard on the form of the order prior to its execution.

Two orders were executed in this case, one dated July 15,,1985 (a40-a43), and the other dated August 9, 1985 (a55-a58). In both cases the requirements of Rule 4:42-1 were clearly ignored. With respect to the July 15th Order, petitioner received a copy of an already executed Order on July 17th (July 26th Certification at para 11, a48). She obviously had no input into its form or content.

Moreover, there was a very real problem with the content of that Order, as petitioner stated in her July 26th certification at paragraph 11. The Order submitted by respondent's counsel failed to specify that the deed to any new residence purchased by respondent, must contain the same condition (that

respondent may not move with the children to a new residence until the youngest child finishes high school) as the condition found in the current deed. This, despite the fact that Judge Imbriani clearly ordered this in his oral decision. (July 12, 1985 Transcript at page 25, a39). This was a very important part of the judge's overall decision and its omission from the order adversely affects the rights of petitioner. It was to avoid such an injustice, that Rule 4:42-1 was originally promulgated. Had petitioner been afforded the opportunity, required by the Rules, to be heard on the content of the order, prior to its execution, the order would have more accurately reflected the judge's actual decision, and petitioner's rights would have been protected.

A very similar situation occurred with respect to the August 9th Order

which arose from the August 2nd oral argument of respondent's motion for reconsideration.

This time, respondent's attorney did attempt to comply with Rule 4:42-1. A proposed order was submitted to the judge on August 6, 1985. A copy was forwarded to petitioner, as required. However, Judge Imbriani signed the Order on August 9, 1985, before the expiration of the 5 day period for objections, required by Rule 4:42-1(b); he did not consider the objections expressed by petitioner in her letter of August 8, 1985, although those objections were submitted well within the 4:42-1(b) time frame. (a61) The judge himself was concerned with the propriety of his actions and wrote to respondent's counsel expressing his concern on September 6, 1985, upon reading petitioner's letter of objections for the first time. (a58-a59)

Unfortunately, the judge ultimately declined to remedy the situation as expressed in his letter of September 17, 1985 (a59-a60), and in his denial of petitioner's Motion to Clarify Order of August 9, 1985 and to Stay Execution of the Order Pending Appeal.

The reason the judge gave for declining to correct this error, was that petitioner had appealed the order, and it would be improper for him to amend an order already on appeal. This reasoning is clearly erroneous. The fact that a litigant plans to appeal an Order, does not mean that her right to have input into the form of that order under Rule 4:42-1 is lost. Where an appeal is filed it is very important that the written order accurately reflect the oral decision of the trial court so that the Appellate tribunal may render a fair decision based upon the record below.

(3) The third, and perhaps the most serious error made by the state courts in this case, was their failure to apply the correct standard, under Rule 4:50, as to when a judgment may be set aside after the time to appeal that judgment has expired.

Rule 4:50, set forth above, lists 6 grounds on which judgments may be set aside. The first 5, (a) through (e), deal with fraud, mistake, newly discovered evidence, discharge, and so on. These clearly do not apply in this case. Subparagraph (f) is a catch-all provision which allows judgments to be set aside for "any other reason justifying relief from the operation of the judgment or order".

Over the years New Jersey Appellate Courts have wrestled with the question of when a trial court may properly set aside a judgment pursuant to Rule 4:50-1(f).

Two rules have evolved:

(1) The decision as to whether a judgment may properly be set aside is up to the discretion of the trial judge. Such a decision will be sustained by an appellate court, "...in the absence of an abuse of discretion." (Court Investment Co v Perrillo 48 NJ 334, 341 (1966))

(2) However, relief from Judgment under Rule 4:50-1(f) is permitted "...only when truly exceptional circumstances are present." (Bauman v Marinaro 95 NJ 380, 385 (1984): only where enforcement of the order would be "...unjust, oppressive or inequitable." (Quagliato v Bodner 115 NJ Super 133, 138 (App Div 1971): and only where "...there is a showing of extreme hardship and the equities clearly run in favor of the party applying for relief from the judgment." (Doyle v Chase Manhatten Bank 80 NJ Super 105, 125 (App Div 1963).

Thus, for a lower order, setting aside a judgment under this rule, to be sustained, there must be a finding of some truly extraordinary circumstances to justify the relief. In the absence of such a finding, it is an abuse of the trial court's discretion to set aside the judgment.

There is no question that this is the standard under which Rule 4:50-1(f) motions are considered. This was acknowledged by the Superior Court, Appellate Division in its opinion at page 4-5 (a45). What that court failed to do however, was to set forth any extraordinary circumstances in the record which would justify the exercise of the trial court's discretion under Rule 4:50-1(f), any explanation as to how enforcement of the Order would be unjust or oppressive or inequitable, or any explanation as to how the equities could

be said to clearly favor respondent: "While we recognize that relief from a judgment is permitted under R.4:50-1(f), 'only when truly exceptional circumstance are present' (Bauman v Marinaro 95 NJ 380, 395 (1984)...we cannot fairly say that the trial judge mistakenly exercised his discretion in this case." (App Div opinion, a100)

No discussion of the facts in the record followed this statement. Nor is there any discussion elsewhere in the opinion as to what, if any, extraordinary circumstances the court relied on to support the trial court's decision. The reason seems obvious. There simply were no extraordinary circumstances set forth by respondent which would justify relief under Rule 4:50-1(f).

In 1980 respondent voluntarily entered into an agreement to resolve all issues concerning custody, visitation,

and disposition of marital property. Since then, petitioner fulfilled all of her obligations under that agreement and respondent reaped substantial benefit from it.

Five years after the consent judgment was entered, respondent went back to court seeking relief from paragraph 4 of the judgment, which conditioned the conveyance of the marital property to respondent on his continued occupancy of the home with the minor children.

The basis of respondent's application was not a claim that the agreement was unjust or inequitable when entered into, or that petitioner had done anything since the agreement to render it unjust or inequitable to enforce it now. Nor did respondent claim fraud, mistake, change of law, or any other recognizable equitable ground for relief from

judgment. Instead respondent based his application solely on the fact that in 1983 his new wife had given birth to another child making the current residence too small, in his (respondent's) opinion.

It is very significant that the trial judge never made a finding of fact that the house was in fact too small.2 The judge simply concluded that if respondent considered it too small he would be permitted to move:

> "In other words, I felt that if it was necessary, in the opinion of Mr. Mastropietro to sell the home , that home, I would permit him to do so." (Transcript of Aug 2 at pg3, a52, emphasis supplied)

Such a circumstance simply does not

2. The Appellate Division mischaracterized the trial court record when it stated "citing the crowded nature of defendant's present living conditions, the trial judge granted the motion to modify the judgement of divorce."(App Div opinion page 3, a79)

constitute sufficient grounds for relief from judgment under controlling caselaw in the State of New Jersey.

First, and most obvious, the equities do not clearly run in respondent's favor.(Doyle , supra) Quite the contrary. The birth of another child was a foreseeable circumstance in 1980 when respondent agreed to remain in the marital home. He was 28 years old at the time and had already fathered 3 children. The possibility of remarriage was, in fact, explicitly provided for in paragraph 4 of the 1980 judgment. (a5) And the possibility that children would follow was certainly not remote.

Moreover, enforcement of the judgment would not be unjust or oppressive to respondent (Guagliato , supra). As petitioner argued in her Certification in Opposition (a26, para 5) and again at oral argument (July Transcript pg7, a31),

if respondent felt he needed more room he could have simply added on to the marital residence at no greater cost or inconvenience than moving to a new residence would involve. This point was totally ignored by both the trial court and the Appellate Division, but is pivotal to a proper decision in the case.

For, in agreeing to remain in the marital residence until the children graduated from high school, respondent implicitly agreed that if he needed more room for his family, he would have only one option--to add on to his existing residence. He gave up his other obvious option to move to a larger residence. And in no way was that an unfair, or an unconscionable agreement. It was entered into voluntarily and substantial benefit was derived by respondent in exchange for that property condition. In no way would it be unjust or inequitable to hold

respondent to the obligation of his bargain, after he has already reaped the benefits of that bargain.

New Jersey caselaw is unanimous on this point. In no reported case interpreting the scope of R.4:50-1(f) has relief been afforded where, as here, there is such a clear absence of exceptional circumstances to mandate relief, and where the equities clearly favor the non-moving party rather than the moving party.

Though the Appellate Division cited several cases in support of its decision, at pages 4-5 of its opinion, a close examination of those cases reveals that none truly supports its holding.

In several of the cases cited, relief under R.4:50-1(f) was actually denied: cf Ganther v Ganther , 153 NJ Super 226 (App Div 1977): Quagliato v Bodner , supra: Bauman v Marinaro ,

supra; Gulick v Gulick, 113 NJ Super 366 (Ch Div 1971).

And in those cases where relief was granted, the moving party had always been able to demonstrate exceptional circumstance warranting extraordinary relief under R.4:50-1(f): in Edgerton v Edgerton, 203 NJ Super 160 (App Div 1985), the Legislature had recently changed the law and removed inherited property from the reach of the equitable distribution statute. The divorce judgment was modified only to reflect the new law (which had already been given retroactive effect in Gibbons v Gibbons, 86 NJ 515, 524 (1981)). In Court Invest Co. v Perillo, 48 NJ 334 (1966), a 20 year old default judgment was vacated, but only after the Court determined that the default had been procedurally deficient to begin with, that defendant's attorney had been subjected to disbarment

proceedings 18 days after the complaint had been served upon defendant, and was thus incapable of handling the case at the time; that "...plaintiff's attempt to revive the abandoned summons amounts to inequitable conduct" (Perillo at 344); and that "...the equities strongly favored defendant" (Perillo at 347). In Hoagson v. Applegate , 31 NJ 29 (1959), the motion to vacate under R.4:50-1(f) was made only 34 days after entry of judgment, before the time to appeal had expired. The motion was based on allegation of fraud, newly discovered evidence, and trial errors; and it was granted only after the Court determined that defendant had not appealed due to a mistake on his attorney's part. In Manning Engineering v. Hudson Cty Park Comm , 24 NJ 113, 120 (1977), a R.4:50-1(f) motion for relief from judgment under a contract was granted,

only after a determination that the contract had been fraudulently and illegally entered into, and that to enforce such a contract would violate the very strong public policy against enforcement of illegal contracts (Manning at 123-125). Finally, in Palko v. Palko , 73 NJ 395 (1977), the Court was faced with plaintiff wife's allegations that her husband had intentionally and willfully withheld material information as to the value of his holdings during negotiation of a property settlement agreeement incorporated into a divorce judgment. The Court however, did not hold that the requirements of R.4:50-1(f) had been met, only that the wife was entitled to a hearing on this issue.3

Here, where there was no allegation

3. In this case, plaintiff, the non-moving party, was not even afforded a hearing. This point will be developed below

of fraud, mistake or change of law; and where there was no evidence that enforcement of the judgment would be unjust or oppressive to respondent, the moving party, it was clearly improper for respondent's motion to have been granted.

The decision of the trial court was based, not upon accepted principles of law, but, rather, upon the arbitrary whim of the court. Such a decision violates clear precedent in New Jeresey law, as well as, the Due Process and Equal Protection Clause of the U.S. Constitution as construed by the U.S. Supreme Court:

> "This discretionary authority [in Rule 4:50 cases] is legal and not arbitrary in character; it must be exercised in consonance with established principles of law...judicial discretion, to borrow the words of Lord Mansfield, means "sound discretion guided by law and not by whim or humor.'" (LaBell v Quasdorf

116 NJL 366, 372 (Sup Ct 1936) citations omitted)

In deciding when an error of a state court will constitute a denial of Due Process, the Supreme Court has said:

> "...the Fourteenth Amendment is not a guarantee that a trial shall be devoid of error. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action." (Roberts v City of New York 295 US 264, 277 (1934)(emphasis supplied, citation omitted)(cf Chicago Life Ins Co v Cherry 244 US 25 (1917), Marshall v Jericho Inc , supra))

Here the decision of the trial court, affirmed by the Appellate Division, crossed way over the boundary of arbitrary action. The only explanation for the decision was that the trial judge felt that respondent should be permitted to move. This decision was not based upon the facts of the case or

upon any legal precedent. It was simply the opinion of the judge that respondent should be allowed to move. Such a decision, with no legal basis for it, constitutes arbitrary action in violation of the Due Process Clause of the 14th Amendment.

In the context of an application for admission to a state bar, the U.S. Supreme Court emphasized the principle that where important rights are at stake, there must be some basis in fact and law for a decision infringing upon those rights:

> "Even in applying permissable standards, officers of a state cannot exclude an applicant where there is no basis for their finding that he fails to meet those standards, or when their action is insidiously discriminatory." (Schware v Bd of Bar Examiners of the State of New Mexico 353 US 232, 239 (1957)

Here the standards for consideration

of a motion under Rule 4:50-1(f) were clearly set forth in state caselaw. Under those standards there was no factual or legal basis for the Court to grant respondent's motion. The action of the Court violated the Equal Protection, as well as, the Due Process Clause of the 14th Amendment:

> "Though the law itself be fair on its face, and, impartial in appliance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Yick Wo v Hopkins 118 US 355 (1886) (cf Schwarc , supra))

Petitioner had a Constitutional right to be treated the same as any other citizen of the State of New Jersey with respect to her rights under a valid judgment of a Court of the State of New

Jersey. The decision of the trial court, affirmed by the Appellate Division, to arbitrarily alter the terms of the judgment violated her Due Process and Equal Protection rights protected by the 14th Amendment.

(4) The next error of Constitutional proprtions, made by the state courts, was their failure to apply the proper standard, under Rule 4:50-2, as to whether a motion to vacate a judgment has been made within a reasonable time.

There is very good reason for the time requirements of Rule 4:50-2:

> "The principle of finality of judgments is one of repose. It dictates that litigation must eventually be ended and that at some point the prevailing party be allowed to rely confidently on the inviolability of his judgment." (Hodgson v_Applegate supra at 43)

And as the U.S. Supreme Court said in Ackerman_v_United_States 340 US 193,

198 (1950):

> "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

Here respondent made a free, calculated and deliberate choice in 1980 to remain in the marital residence until his youngest child graduated from high school in order to gain ultimate possession of the property.

In Falco v Falco supra, the New Jersey Supreme Court was faced with an application to set aside a property settlement agreement incorporated into a divorce judgment. In considering the timeliness of that application, the court said at 398:

> "A significant element in the timeliness of plaintiff's motion, noting the structures of the rule, would consist of the date when plaintiff first discovered the facts underlying her application..."

In this case, the fact underlying the

application was that defendant had another child and that he felt he needed more living space for that child. Defendant first discovered this fact in about October, 1982, when the child was conceived (born June, 1983). Yet respondent waited 33 months, until June, 1985, before he applied for relief from the judgment.

The Appellate Division dismissed petitioner's timeliness argument in one sentence:

> "While defendant may have anticipated earlier the problems that ultimately compelled him to seek relief from the divorce judgment, this delay was not prejudicial to plaintiff and was understandable in light of the gradually increasing need for living space as the children grew older." (App Div opinion at page 5)

Here the court ignores the very reason for the existence of Rule 4:50-2, that at some point litigation must be

endeo. and that the prevailing party must at some point be alloweo to rely upon the inviolability of her judgment.

This was not an initial trial of an unlitigated marital issue. This was a motion for relief from a 5 year old judgment.

Prejudice to a non-moving party from the setting aside of an old judgment is presumed. It need not be proven.

Otherwise there would be no reason to have a rule as R.4:50-2 at all. Very significantly, respondent offered no explanation for the 3 year delay in bringing the motion. Once again, the state courts ignored established standards to reach the result they wanted. Such arbitrary action is a violation of the Due Process Clause of the 14th Amendment.

(5) The final major procedural error

committed by the state courts was their denial to petitioner of a plenary hearing to resolve disputed issues of fact.

The importance of a plenary hearing as a guarantee of due process has been repeatedly recognized by both Federal and New Jersey State Courts:

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v Kelly 397 US 254, 269 (1970)(Eg Arnett v Kennedy 416 US 134 (Marshall dissenting)(1974); Cleveland Bd of Educ. v Loudermill 105 S Ct 1482 (Brennan concurring in part, dissenting in part)(1985))

This principle has recently been emphasized in New Jersey in the context of a motion made pursuant to Rule 1:6-2. In Fusco v Fusco 186 NJ 321 (App Div 1982), the Appellate Division reversed a trial courts denial of a plenary hearing

in the context of a matrimonial motion. The Fusco Court expressly disapproved of the trend in New Jersey towards deciding disputed issues based upon written certifications alone:

> "It was never the intention of these rules to dispense with due process altogether by eliminating the necessity of an evidential basis of decision. These rules consequently have absolutely no applicability at all when the matter before the court is not one which can be decided on papers but is rather one which requires findings of facts on properly adduced evidence. In short, if the proper disposition of a matrimonial dispute requires a plenary hearing, the dispute is by definition not subject to disposition on papers, with or without oral argument. Moreover, disputes implicating the welfare of a child and involving conflicting contentions and opinions of lay and expert affiants must be submitted to a plenary hearing."(Fusco at 329)

In this case, despite very obvious factual disputes, petitioner was denied an evidentiary hearing. The Appellate

Division denied petitioner's contention that she was entitled to such a hearing:

> "We conclude from the record that there was no genuine issue of material fact. We thus, find that the trial judge did not abuse his discretion in denying an evidentiary hearing."(App Div opinion at page 5)(a97)

This conclusion is incredible in light of the record before the court. An examination of that record reveals that the trial court did not make any findings of fact in the course of its oral decisions, after argument on July 12th and August 2nd.

The record reveals further that the three key factual issues at the very heart of this matter remain very much in dispute:

(1) Whether the current residence is actually too small for respondent and the children? Respondent claimed in his Certification (a18) that it was;

petitioner disputed this claim in her Certification (a26). This is a threshhold factual issue, which the trial court never addressed, holding only that, if respondent felt it was necessary to sell the home, he would be permitted to do so. (Aug Transcript pg3, a52)

(2) If respondent could establish as fact that the living conditions are harmful or oppressive, whether respondent is capable of his own relief within the bounds of the agreement and judgment? Petitioner raised the issue (Certification at para 5, a26) that respondent could add-on to the residence at no greater cost than moving. The trial judge simply assumed it would be more expensive, with no proof to support his assumptions (July Transcript at page 7, a31-a32)

(3) Whether the children are best nurtured by remaining in their current home or by moving to a new residence?

Petitioner raised concerns of harm to the children relative to the proposed move (Certification at paras 6,7, & 12; a26-a29) (July Transcript pg 10, 14;a32-a33, a36)(August Transcript pg 10, 12; a50-a55); the trial court, as did respondent, minimized these concerns with generalizations (July Transcript page 10 to 11; a33);the trial court record indicates the decision was based on repondent's opinion (August Transcript a52); the App Div opinion indicates their interpretaion was that the decision was based on the "the best interests of the family unit"(a98). No facts were established specific to these children. Most significantly, no facts of harm, relative to current conditions, were established warranting government intervention as parens patriae in a parenting decision.

If concern for the welfare of the

children is integral to this case, that issue should be fairly decided at a hearing (Fusco v Fusco , supra).

In Barrie v Barrie , 154 Super 301 (App Div 1977), plaintiff wife moved to rescind a property settlement agreement on the basis that she had been incompetent to contract. Unlike this case, the motion to vacate and the request for a hearing were both denied. The Court would not even consider the possibility of granting the motion without a hearing:

> "There is, of course, no doubt that plaintiff was not entitled to either a reopening of the judgment or to a recission of the settlement agreement merely by virtue of her affidavit and certification. The fundamental issue before us is whether she was entitled to an evidentiary hearing on the basis of the record made below." (Barrie at 303)

In this case, petitioner raised substantial factual issues which were not resolved. It was error for the Court to grant the motion, and for the Appellate Division to affirm without an evidentiary hearing on disputed factual issues. (Goldberg v Kelly , supra)

2. THE DECISION OF THE TRIAL COURT, AFFIRMED BY THE APPELLATE DIVISION, TO OVERRIDE A 1980 PARENTAL CHOICE AS TO WHERE THE CHILDREN OF THE PARTIES SHOULD LIVE, IN THE ABSENCE OF ANY EVIDENCE THAT THAT PARENTAL CHOICE WAS HARMFUL TO THE CHILDREN, DEPRIVED PETITIONER OF HER PARENTING RIGHTS IN VIOLATION OF THE 1ST, 9TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION

The United States Supreme Court has reiterated time and again the great deference which must be shown to a parent's right to raise her children as she sees fit:

> "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this court with a momentum for respect lacking when appeal is

> made to liberties which derive merely from shifting economic arrangements'... The rights to conceive and raise one's children have been deemed 'essential', 'basic civil rights of man and rights far more precious ...than property rights'.'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that state can neither supply or hinder'. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."(Stanley_v_Illinois 405 US 645, 651 (1972)(citations omitted)(cf Lassiter_v_Dept_of Social_Services 452 US 18, 27 (1981) .

The right to determine where one's children should live is clearly part of a parent's interest in the "custody, care, and nurture" of her children, and this is included in those parenting rights protected by the U.S. Constitution. Here the determination as to where the

children should live until they finish high school was explicitly made by the children's parents in 1980. In the absence of any evidence that that parental choice was harmful to the children, it was improper for the State of New Jersey to intervene and substitute its own judgment for the judgment of the children's parents. The trial judge made no findings of fact that the children would be harmed by remaining in the marital home:

> "...I felt that if it was necessary in the opinion of Mr. Mastropietro to sell the home, that home, that I would permit him to do so." (August Transcript at pg, a52)

Such a holding interfered with petitioner's parenting decision, expressed in paragraph 4 of the original divorce judgment, in violation of the Constitution of the United States.

3. THE TRIAL COURT ORDER REQUIRING PETITIONER TO RELINQUISH HER REVERSIONARY INTEREST IN THE MARITAL PROPERTY WITHOUT BENEFIT OF AN EVIDENTIARY HEARING, OTHERWISE REQUIRED BY NEW JERSEY LAW, VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT.

The Legislature of the State of New Jersey has set up a procedure for the determination of disputes concerning the ownership of interests in real property in this state. That procedure is as follows:

1. A person in peaceable possession of lands may bring an action to quiet title in the Superior Court where his title thereto, or any part thereof, is denied or disputed. (N.J.S.A.2A:62-1 set forth above)

2. A person, not in possession of lands, but claiming a future interest in those lands, may maintain an action in the Superior Court to settle the title to the land. (N.J.S.A.2A:62-17, set forth above) Once again either party has the right to

trial by jury (N.J.S.A.2A:62-18, set forth above)

On January 14, 1981, petitioner conveyed her interest in the marital property at 71 Highland Avenue, Bridgewater, New Jersey to respondent subject to the condition that,

> "4....The condition of the conveyance, however, shall be the continued occupation of the said [residence] by the defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school..." (property deed, a14)

Thus, in June, 1985, when respondent brought his motion to amend the divorce judgment, petitioner retained a valuable interest in the marital property.4

Respondent sought an order

4. There is some question as to whether the interest would be delineated as a reversion or as a reverter (cf Oldfield v Stoeco Homes Inc 26 NJ 246 (1958). This issue is irrelavant however to the current inquiry.

extinguishing petitioner's rights in the property. Under very clear statutory law, the correct course for respondent to have taken was to bring an action to quiet title under N.J.S.A.2A:62-1. Petitioner would then have had the right to defend against such an action, including the right to full trial by jury (2A:62-4).

Instead petitioner's valuable property rights were taken from her on motion based on Certifications alone. She not only was denied a trial by jury; she was denied a trial period. The action of the state courts thus clearly constituted a violation of the Due Process and Equal Protection Clauses of the 14th Amendment:

> "The requirements of the 14th Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government." (Minder_v

Georgia 183 US 559 (1901) (cf. Yick Wo v Hopkins, supra))

Trial in this case was clearly not had according to the settled course of judicial procedures. Instead, petitioner was denied her statutory right to a trial of all issues concerning her rights under the January 14, 1981 deed, with no possible justification for such a denial. The state courts' action was thus a clear violation of the Due Process and Equal Protection Clauses of the 14th Amendment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court, Appellate Division, State of New Jersey.

Respectfully submitted,
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September 25, 1986